Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22C-40–03 OF 2017
LEE SWEE SENG J
31 MAY 2019

Contract — Agreement — Defendant terminated agreement with plaintiff — Whether plaintiff entitled to sue all three defendants as parties to oral contract — Whether plaintiff proved sum due for building works and the M&E works executed — Whether plaintiff had proved variation works carried out — Whether plaintiff had proved value of materials and equipment left at side after termination of contract — Whether defendant's termination of contract valid and lawful — Whether second defendant proved loss of net profit suffered by second defendant as a result of delay of operations by plaintiff — Whether first defendant proved loan of RM800,000 to plaintiff returned to first defendant — Whether second defendant proved damages for defective and non-compliance of works of plaintiff

The plaintiff was engaged around September 2013 by the defendants to carry out demolition and renovation works involving building and mechanical and electrical works in converting the two units of shop office buildings into a boutique hotel in Brickfields, Kuala Lumpur ('the contract'). The first defendant was a pilot by profession and was a director and majority shareholder of the second defendant and the third defendant. The first defendant had also held himself out as both the CEO and managing director of the second defendant. The ones left to at the time when the plaintiff was executing the works were the mechanical and electrical consultant Ir Tan Boon Ann ('PW3) and the architect, Ar Vincent Lo ('DW2'). Initially, the plaintiff was engaged to carry out hacking and demolition works only whilst the drawings and structural plans as well as the BQ were drawn up. The plaintiff's main witness and the one at the site doing and directing the works was Mr Victor Jagadeesan a/l S Joseph ('PW1'), the founder and director of the plaintiff. PW1 testified that the whole works were suspended from December 2013 to early March 2014. The fall-out was because on 19 December 2013, the defendants terminated the services of the second project architect as well as the consultants by way of an email. Only on 21 February 2014 did the first defendant write to call for a consultant meeting to resolve outstanding issues prior to the commencement of renovation works on 1 March 2014. The plaintiff was still unsure as to whether it would be awarded the main contract and that prompted the email of that date. Until the finalisation of the contract sum, the plaintiff made claims for works done and the defendants paid, on an ad hoc and

progressive basis, without any certification by either the consultants or the architect. After some negotiations, the parties settled on a final lump sum contract price ('original contract price') with a schedule of prices and the plaintiff's scope of works which included the building and M&E works. The first defendant required that payments shall no longer made to the plaintiff until all claims were verified and recommended by the architect. The plaintiff submitted progress claim No 3 which was certified by the fourth project DW2 with a total value of works executed by the plaintiff as at 27 October 2014 at RM987,750, approximately 45% of the original contract price of RM2,195,000. The defendants omitted from the plaintiff's scope of works certain items such as water proofing, tiling and plaster ceiling for the sum of RM664,450. The revised final price of the contract became RM1,531,800. The plaintiff was continuing to carry out the project works when the first defendant suddenly on the spot and without notice orally terminated the plaintiff on 5 December 2014. The plaintiff said that the termination was unlawful. DW2 wrote to the defendants requesting the defendants to appoint a quantity surveyor to assess and value the plaintiff's works done as at the termination. The defendants proceeded to appoint sub-contractors to complete the balance works at site, inclusive of those omitted or not originally in the plaintiff's scope of works. DW2 requested PW3 to assess and certify the value of the plaintiff's M&E works completed with the total value of RM404,668 and RM871,615 for various valuations of the plaintiff's work. The issues were: (a) whether the plaintiff were entitled to sue all the three defendants as parties to the oral contract; (b) whether the plaintiff had proved the sum due for the building works and the M&E works executed by them; (c) whether the plaintiff had proved the variation works carried out by them; (d) whether the plaintiff had proved the value of the materials and equipment left at the side after the termination of the contract; (e) whether the defendant's termination of the contract was valid and lawful in the circumstances of the case; (f) whether the second defendant had proved a loss of net profit of RM1,079,510.88 suffered by the second defendant as a result of the delay of the operations by the plaintiff; (g) whether the first defendant had proved the loan of RM800,000 to the plaintiff which was returned to the first defendant; and (h) whether the second defendant had proved damages for the defective and non-compliance of works of the plaintiff.

Held:

(1) Where the human persona of the first defendant merged with the corporate juristic personae of the second defendant and third defendant, both under his control and management and employed by the first defendant interchangeably as and when convenient to him, then in such a case the controlling persona might be sued together with the vehicles deployed by him in executing and operating the project. The plaintiff's claim should not be defeated on the sole ground that when the first and

A the second defendant were sued, they then would say that the third defendant was liable and when the third defendant was sued the third defendant then said the first defendant or the second defendant alone was liable. Conflation of legal personae cleverly constructed should not be a cover to evade contractual obligations or to confuse the plaintiff as to the B real identities of the contracting parties. Where the defendants, under the control of the first defendant had represented themselves collectively as a single unity acting in concert, they could not dissociate themselves from their collective contractual obligations to the plaintiff under the oral contract (see paras 49–52).

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(2) Irrespective of the validity of the termination by the defendant, the plaintiff would still have to be paid for the works executed by them up to the date of the termination. The court agreed with the learned counsel of the plaintiff that despite DW2's insistence that his valuation of works D done to date, it was nevertheless a valuation and quantification by DW2 as a professional architect with his experience and expertise brought to bear on the said works and to attribute and quantify a value of RM871,615. DW2's valuation and quantification could be professionally justified. It would be more accurate to say nobody knew E but surely the M&E consultant engineer in PW3 and DW2 and their combined evidence as to the value of work done by the plaintiff would be the best evidence where the defendants could not be bothered about engaging a quality surveyor but found it convenient to pay the plaintiff. DW4's expert report was premised on the erroneous fining that there F were no variation orders works carried out by the plaintiff and admitted she was not familiar with the plaintiff's scope of works and made little reference to the building plans with which not familiar. The court could not see how the kind of valuation and verification could not done by a G properly qualified and trained engineer in PW3 or an architect in DW2 (see paras 53, 65, 72, 76 & 80).

(3) The court satisfied that the variation works were approved by the architect where 100% of the works had been valued by the architect. DW2 was firm and forthright in confirming that the variation orders H were necessitated by change in the plans and designs of the defendants and any variation to accommodate the changes as approved and confirmed by the architect was an approved variation order. Though the DW2 was a witness of the defendants yet his evidence which was uncontroverted stood as part of the defendant's case from which the I defendants could not dissociate. The court was satisfied that the requirements had been met to satisfy the exception that the owner or the defendants having by their conduct waived their right to insist on written instruction for variation. The defendants were estopped from denying that the plaintiff of the variation orders works done. The court allowed

RM76,800 as the variation orders claims together with interest at 5%pa from the date of statement of claim to realisation (see paras 88–89, 91 & 94–95).

(4) Though the claim made was RM55,239.80, the court took into consideration depreciation of the materials and the fact that the plaintiff did not show the replacement costs of the equipment and there was a need to mitigate loss. The tools and machinery were some one to three years old. Credit must be given for the fact that the scaffolding had to be rented by the plaintiff from third parties. The court therefore allowed a sum of RM30,000 with interest at 5%pa from the date of the statement of claim to realisation (see paras 106–107).

(5) There was no completion date in the contract between the plaintiff and the defendants. When the plaintiff was appointed around September 2013 to be solely responsible for hacking and demolition works, no completion date was set for the plaintiff. There was a suspension of the works for two and half months which was not translated into any extension of the time to the plaintiff. Indeed there was no extension of time provision in the contract. The changes in the team of architects and consultants resulted in numerous changes to the project's designs, plans and parameters. All the delays were caused by the defendants and they could not take advantage of their wrongs and penalised the plaintiff with claims for damages arising out of the late completion of the hotel. There was no termination clause in the contract and thus unless the plaintiff had repudiated the contract, the defendants had no right to terminate the contract. The plaintiff had not repudiated the contract and indeed was still continuing with the works with all due diligence and that the defendants had been guilty of causing the delay and as such the on the spot termination was unlawful in the circumstance of the case. Even allowing for valid reason for terminating the contract under common law though not spelt out by the first defendant when terminating the contract, it was found that the second defendant's termination based on delay on the part of the plaintiff was not valid and justified (see paras 108–109, 119 & 128–129).

(6) The defendants had been resolute in refusing to produce the documents which would substantiate when the hotel was ready for business. The defendants failed to produce any documents in the form of application forms, certificates or licenses as requested to prove the operation of the hotel. The defendants had not shown the period of delay attributed to the plaintiff as there was no certificate of non-completion issued to the plaintiff. The difficulty in proving loss of profit does not dispense with proof of it. The second defendant failed to produce or tender account books and necessary support documents upon which their statements of account were based. This was fatal to the second defendant's claim for

damages. The claim for damages in the loss of net profit arising out of the delay caused by the plaintiff in completing the works leading to the late opening of the hotel was dismissed for lack of evidence (see paras 138–140 & 147–148).

(7) There was no evidence to show that the said RM800,00 was a loan by the first defendant to the plaintiff for if it indeed was, one would have expected the terms of the loan to have been spelt out. It was more likely that it was advance payment to the plaintiff for them to start the works, it was not uncommon for a relatively small contractor who could not be expected to fund the project to actually ask and received an advance for purchase of materials and supply of labour. The court satisfied that the total sum of RM924,975 paid by the first defendant to the plaintiff had been accounted for and treated as payment for the works done by the plaintiff for the project and that included the RM800,000 advanced to the plaintiff. Though the sum of RM800,000 was advanced by the first defendant to the plaintiff, it was meant for the project and the plaintiff had understood it as such. There was thus no further sum of RM800,000 still outstanding as a loan from the first defendant to the plaintiff (see paras 149–152 & 154).

(8) The overall evidence to support and substantiate the defendants' claim for defective works were unsatisfactory. The indirect payment made to a third-party contractor did not help the defendants to prove that the works were defective works within the scope of the plaintiff's works to begin with. The court had no good reason to disbelieve the DW2 who gave his evidence candidly as a professional as there was no opportunity for the plaintiff to make good as the oral termination was on the spot without any prior notice to rectify any breach. The assessment and valuation of the works done were confined only to the works properly done and not to works that were shoddy where the plaintiff had no opportunity to make good yet. The plaintiff's work could not be said defective as at the point of termination, the plaintiff had not completed the works yet and any works not according to the specifications or substandard works had not been assessed or verified for payment (see paras 168–169).

[Bahasa Malaysia summary

Plaintif dilantik sekitar September 2013 oleh defendan untuk menjalankan kerja-kerja perobohan dan pengubahsuaian yang membabitkan bangunan dan kerja-kerja mekanikal dan elektrik untuk menukarkan dua unit bangunan pejabat kedai menjadi sebuah hotel butik di Brickfields, Kuala Lumpur ('kontrak'). Defendan pertama adalah seorang juruterbang dan merupakan pengarah dan pemegang saham majoriti defendan kedua dan defendan ketiga. Defendan pertama juga telah mengemukakan dirinya sebagai Ketua Pegawai Eksekutif dan pengarah urusan defendan kedua. Yang ditinggalkan pada ketika

plaintif sedang melaksanakan kerja adalah perunding mekanikal dan elektrik Ir Tan Boon Ann ('PW3') dan arkitek, Ar Vincent Lo ('DW2'). Pada mulanya, plaintif dilantik untuk menjalankan kerja-kerja penggodaman dan perobohan sahaja manakala lukisan dan pelan struktur serta BQ disediakan. Saksi utama plaintif dan yang berada di tapak melakukan dan mengarahkan kerja-kerja tersebut ialah Encik Victor Jagadeesan a/l S Joseph ('PW1'), pengasas dan pengarah plaintif. PW1 memberi keterangan bahawa semua kerja telah digantung dari Disember 2013 hingga awal Mac 2014. Kejatuhan itu adalah kerana pada 19 Disember 2013, defendan menamatkan perkhidmatan arkitek projek kedua serta perunding melalui emel. Hanya pada 21 Februari 2014 defendan pertama menulis untuk memanggil mesyuarat perunding untuk menyelesaikan isu-isu tertunggak sebelum permulaan kerja-kerja pengubahsuaian pada 1 Mac 2014. Plaintif masih tidak pasti sama ada ia akan diberikan kontrak utama dan yang mendorong emel pada tarikh itu. Sehingga penyelesaian jumlah kontrak, plaintif membuat tuntutan untuk kerja-kerja yang dilakukan dan defendan membayar, secara ad hoc dan progresif, tanpa sebarang perakuan oleh sama ada perunding atau arkitek. Selepas beberapa rundingan, pihak-pihak menetap pada harga kontrak sekaligus ('harga kontrak asal') dengan jadual harga dan skop kerja plaintif yang termasuk bangunan dan kerja M&E. Defendan pertama menghendaki pembayaran tidak lagi dibuat kepada plaintif sehingga semua tuntutan disahkan dan disyorkan oleh arkitek. Plaintif mengemukakan tuntutan kemajuan No 3 yang telah diperakui oleh projek keempat DW2 dengan jumlah nilai kerja yang dilaksanakan oleh plaintif pada 27 Oktober 2014 sebanyak RM987,750, kira-kira 45% daripada harga kontrak asal sebanyak RM2,195,000. Defendan mengecualikan dari skop kerja plaintif beberapa item tertentu seperti pengalis air, jubin dan plaster siling untuk jumlah RM664,450. Harga akhir kontrak yang disemak semula menjadi RM1,531,800. Plaintif meneruskan kerja-kerja projek apabila defendan pertama secara tiba-tiba dan tanpa notis secara rasmi menamatkan plaintif pada 5 Disember 2014. Plaintif berkata bahawa penamatan adalah tidak sah. DW2 menulis kepada defendan meminta defendan melantik juruukur untuk menilai kerja-kerja plaintif yang dilakukan pada penamatan. Defendan meneruskan melantik subkontraktor untuk menyelesaikan baki kerja-kerja di tapak, termasuk yang telah dikecualikan atau tidak pada asalnya dalam skop kerja plaintif. DW2 meminta PW3 untuk menilai dan mengesahkan nilai kerja M&E plaintif yang diselesaikan dengan jumlah nilai RM404,668 dan RM871,615 untuk pelbagai penilaian kerja plaintif. Isu-isu adalah: (a) sama ada plaintif berhak untuk menyaman kesemua tiga defendan sebagai pihak dalam kontrak lisan; (b) sama ada plaintif telah membuktikan jumlah yang terhutang untuk kerja-kerja bangunan dan kerja-kerja M&E yang dilaksanakan oleh mereka; (c) sama ada plaintif telah membuktikan kerja-kerja pengubahan yang dilakukan oleh mereka; (d) sama ada plaintif telah membuktikan nilai bahan dan peralatan yang ditinggalkan selepas penamatan kontrak; (e) sama ada penamatan kontrak oleh defendan sah dalam keadaan kes tersebut; (f) sama ada defendan kedua telah membuktikan kehilangan

keuntungan bersih sebanyak RM1,079,510.88 yang dialami oleh defendan kedua akibat penangguhan operasi oleh plaintif; (g) sama ada defendan pertama telah membuktikan pinjaman RM800,000 kepada plaintif yang dikembalikan kepada defendan pertama; dan (h) sama ada defendan kedua telah membuktikan ganti rugi untuk kerja-kerja plaintif yang rosak dan tidak dipatuhi.

Diputuskan:

(1) Apabila persona manusia defendan pertama bergabung dengan persona perundangan korporat defendan kedua dan defendan ketiga, kedua-duanya di bawah kawalan dan pengurusan dan diambil bekerja oleh defendan pertama secara bergantian apabila mudah kepadanya, maka dalam hal sedemikian persona yang mengawasi mungkin disaman bersama dengan badan yang digunakan olehnya dalam melaksanakan dan mengoperasikan projek. Tuntutan plaintif tidak boleh dikalahkan atas dasar tunggal bahawa apabila defendan pertama dan defendan kedua disaman, mereka kemudian akan mengatakan bahawa defendan ketiga adalah bertanggungjawab dan apabila defendan ketiga disaman defendan ketiga akan mengatakan bahawa defendan pertama atau defendan kedua sahaja bertanggungjawab. Percampuran persona undang-undang yang dibina dengan bijak tidak seharusnya menjadi penutup untuk mengelakkan kewajipan berkontrak atau untuk mengelirukan plaintif tentang identiti sebenar pihak yang berkontrak. Defendan, di bawah kawalan defendan pertama telah mewakili diri mereka secara kolektif sebagai satu unit yang bertindak bersama, mereka tidak boleh memisahkan diri daripada kewajipan kontrak kolektif mereka kepada plaintif di bawah kontrak lisan (lihat perenggan 49–52).

(2) Tanpa mengira kesahihan penamatan oleh defendan, plaintif masih perlu dibayar untuk kerja-kerja yang dilaksanakan oleh mereka sehingga tarikh penamatan. Mahkamah bersetuju dengan peguam plaintif yang bijaksana bahawa walaupun tekanan DW2 bahawa penilaian kerja-kerja dilakukan setakat ini, namun demikian penilaian dan pengiraan oleh DW2 sebagai arkitek profesional dengan pengalaman dan kepakarannya digunakan untuk kerja-kerja tersebut dan untuk menilai dan mengukur nilai sebanyak RM871,615. Penilaian dan pengiraan DW2 boleh dibenarkan secara profesional. Adalah lebih tepat untuk mengatakan tiada siapa tahu tetapi pasti jurutera perunding M&E di PW3 dan DW2 dan keterangan gabungan mereka mengenai nilai kerja yang dilakukan oleh plaintif akan menjadi keterangan terbaik di mana defendan tidak peduli dengan melibatkan juruukur tetapi mendapati ia mudah untuk membayar plaintif. Laporan pakar DW4 didasarkan pada kesilapan yang salah bahawa tiada perintah kerja-kerja pengubahan yang dilakukan oleh plaintif dan mengakui dia tidak biasa dengan skop kerja plaintif dan membuat sedikit rujukan terhadap pelan bangunan yang mana tidak

biasa. Mahkamah tidak dapat melihat bagaimana jenis penilaian dan pengesahan tidak dapat dilakukan oleh jurutera yang berkelayakan dan terlatih dalam PW3 atau arkitek di DW2 (lihat perenggan 53, 65, 72, 76 & 80). A

(3) Mahkamah berpuas hati bahawa kerja-kerja pengubahan itu telah diluluskan oleh arkitek di mana 100% daripada kerja itu telah dinilai oleh arkitek. DW2 tegas dan terus terang dalam mengesahkan bahawa perintah pengubahan diperlukan dengan perubahan dalam pelan dan reka bentuk defendan dan sebarang pengubahan untuk menampung perubahan yang diluluskan dan disahkan oleh arkitek adalah perintah pengubahan yang diluluskan. Walaupun DW2 adalah saksi kepada defendan namun keterangannya yang tidak terkecuali berdiri sebagai sebahagian daripada kes defendan yang mana defendan tidak dapat dipisahkan. Mahkamah berpuas hati bahawa syarat-syarat telah dipenuhi untuk memenuhi pengecualian bahawa pemilik atau defendan dengan kelakuan mereka mengetepikan hak mereka untuk menuntut arahan bertulis untuk pengubahan. Defendan diestopkan daripada menafikan plaintif perintah kerja-kerja pengubahan yang siap. Mahkamah membenarkan RM76,800 sebagai tuntutan perintah pengubahan bersama dengan faedah 5% setahun dari tarikh penyataan tuntutan hingga realisasi (lihat perenggan 88–89, 91 & 94–95). B C D E

(4) Walaupun tuntutan yang dibuat adalah RM55,239.80, mahkamah mengambil kira susut nilai bahan dan fakta bahawa plaintif tidak menunjukkan kos penggantian peralatan dan ada keperluan untuk mengurangkan kerugian. Alat dan jentera berusia antara satu hingga tiga tahun. Kredit mesti diberikan bagi fakta bahawa pelantaran itu perlu disewa oleh plaintif dari pihak ketiga. Oleh itu, mahkamah membenarkan sejumlah RM30,000 dengan faedah 5% setahun dari tarikh penyataan tuntutan hingga realisasi (lihat perenggan 106–107). F G

(5) Tiada tarikh penyelesaian dalam kontrak antara plaintif dan defendan. Apabila plaintif telah dilantik sekitar September 2013 untuk bertanggungjawab sepenuhnya terhadap kerja-kerja penggodaman dan perobohan, tiada tarikh penyelesaian ditetapkan untuk plaintif. Terdapat penggantungan kerja selama dua setengah bulan yang tidak diterjemahkan ke dalam sebarang pelanjutan masa kepada plaintif. Memang tidak ada pelanjutan masa dalam kontrak. Perubahan dalam pasukan arkitek dan perunding menyebabkan banyak perubahan pada reka bentuk, pelan dan parameter projek. Kesemua kelewatan itu disebabkan oleh defendan dan mereka tidak boleh mengambil kesempatan daripada kesalahan mereka dan menghukum plaintif dengan tuntutan ganti rugi yang timbul daripada kelewatan penyelesaian hotel. Tiada klausa penamatan dalam kontrak dan dengan itu melainkan plaintif telah menolak kontrak itu, defendan tidak mempunyai hak H I

untuk menamatkan kontrak. Plaintif tidak menolak kontrak itu dan sememangnya masih meneruskan kerja dengan segala usaha yang wajar dan bahawa defendan telah bersalah menyebabkan kelewatan itu dan oleh itu penamatan segera adalah tidak sah dalam keadaan kes itu. Walaupun membenarkan sebab yang sah untuk menamatkan kontrak di bawah undang-undang biasa walaupun tidak dinyatakan oleh defendan pertama apabila menamatkan kontrak, didapati bahawa penangguhan kedua defendan berdasarkan penangguhan pada pihak plaintif tidak sah dan wajar (lihat perenggan 108–109, 119 & 128–129).

(6) Defendan telah tegas dalam menolak untuk mengemukakan dokumen yang akan mengesahkan apabila hotel itu sudah bersedia untuk perniagaan. Defendan gagal mengemukakan sebarang dokumen dalam bentuk borang permohonan, sijil atau lesen seperti yang diminta untuk membuktikan operasi hotel. Defendan tidak menunjukkan tempoh kelewatan yang disebabkan oleh plaintif kerana tidak ada sijil tidak lengkap yang dikeluarkan kepada plaintif. Kesukaran dalam membuktikan kehilangan keuntungan tidak mengetepikannya. Defendan kedua gagal mengemukakan atau menyerahkan buku akaun dan dokumen sokongan yang diperlukan di mana penyata akaun mereka diasaskan. Ini adalah serius kepada tuntutan defendan kedua untuk ganti rugi. Tuntutan ganti rugi dalam kehilangan keuntungan bersih yang timbul akibat penangguhan yang disebabkan oleh plaintif dalam menyelesaikan kerja-kerja yang membawa kepada pembukaan akhir hotel telah ditolak kerana ketiadaan bukti (lihat perenggan 138–140 & 147–148).

(7) Tiada keterangan untuk menunjukkan bahawa RM800,00 tersebut adalah pinjaman oleh defendan pertama kepada plaintif kerana jika benar, seseorang akan menjangka terma pinjaman itu telah dinyatakan. Ia lebih mungkin bahawa ia adalah pendahuluan bayaran kepada plaintif bagi mereka untuk memulakan kerja-kerja, adalah biasa untuk kontraktor yang agak kecil yang tidak boleh dijangka membiayai projek itu untuk meminta dan menerima pendahuluan untuk membeli bahan-bahan dan bekalan buruh. Mahkamah berpuas hati bahawa jumlah keseluruhan sebanyak RM924,975 yang dibayar oleh defendan pertama kepada plaintif telah diambil kira dan dianggap sebagai bayaran untuk kerja-kerja yang dilakukan oleh plaintif bagi projek itu dan termasuk RM800,000 yang dikemukakan kepada plaintif. Walaupun jumlah sebanyak RM800,000 telah dikemukakan oleh defendan pertama kepada plaintif, ia dimaksudkan untuk projek itu dan plaintif telah memahaminya. Oleh itu, tiada lagi jumlah RM800,000 yang masih belum dijelaskan sebagai pinjaman daripada defendan pertama kepada plaintif (lihat perenggan 149–152 & 154).

(8) Keterangan keseluruhan untuk menyokong dan membuktikan tuntutan

defendan untuk kerja-kerja yang cacat tidak memuaskan. Bayaran tidak langsung yang dibuat kepada kontraktor pihak ketiga tidak membantu defendan untuk membuktikan bahawa kerja itu adalah kerja yang cacat dalam skop karya plaintif. Mahkamah tidak mempunyai alasan yang baik untuk tidak mempercayai DW2 yang memberi keterangannya sebagai seorang profesional kerana tidak ada peluang bagi plaintif untuk membuat pembaikan kerana penamatan lisan segera tanpa sebarang notis terlebih dahulu untuk membetulkan apa-apa pelanggaran. Penilaian dan pengiraan kerja-kerja yang dilakukan hanya terhad kepada kerja yang dilakukan dengan baik dan bukan untuk kerja-kerja yang kurang baik di mana plaintif tidak mempunyai peluang untuk membuat pembaikian lagi. Kerja plaintif tidak boleh dikatakan cacat kerana pada penamatan, plaintif belum menyelesaikan kerja-kerja dan apa-apa kerja yang tidak mengikut spesifikasi atau kerja-kerja substandard tidak dinilai atau disahkan untuk pembayaran (lihat perenggan 168–169).]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3449–3586.

Cases referred to

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)
Epic Quest Sdn Bhd v Sheila Elenor De Costa [2011] 8 CLJ 518, CA (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25, SC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Daniel Lau (Lee Tze Jiet with him) (CK Oon & Co) for the plaintiff.
Rajasegaran a/l M Karuppiah (Pretam Singh, Nor & Co) for the defendant.

Lee Swee Seng J:

[1] The very nature of a construction contract is such that it is potentially problematic with the familiar story line of delayed payments on the one hand and slow progress on the other hand such that when there is a termination, it is almost certain that one side would allege unlawful termination and the other side lawful. A claim for work done by the contractor is invariably met with a

counterclaim for losses arising out of delay and engaging a new contractor to complete the unfinished works.

[2] That is precisely the problem in this case where a piece of renovation work converting two units of shop office buildings into a boutique hotel ('the project') led to unnecessary aggravation because there was no formal contract executed by the parties but what can be gleaned from various emails, correspondence and attachments.

PARTIES AND PERSONALITIES

[3] The plaintiff was engaged around September 2013 by the defendants to carry out demolition and renovation works involving building and mechanical and electrical works in converting the two units of shop office buildings into a boutique hotel in Brickfields, Kuala Lumpur ('the contract').

[4] The first defendant is Ravinder Singh a/l Shangara Singh ('D1'), a pilot by profession. The second defendant CMC I-Care Sdn Bhd ('D2') and the third defendant CMC I-Source Sdn Bhd ('D3').

[5] D1 is a director and majority shareholder of D2 and D3 and the *dramatis persona* of D2 and D3. D1 had also held himself out as both the CEO and Managing Director of D2.

PROBLEMS

[6] Various professionals involved in a construction project such as the architects, mechanical and electrical consultants, the civil and structural consultants and the interior designers had all made their entrances and exits as determined by the *dramatis persona* in D1.

[7] The ones left to at the time when the plaintiff was executing the works were the Mechanical and Electrical ('M&E') Consultant Ir Tan Boon Ann PW3 and the architect Ar Vincent Lo DW2, both having taken over from their predecessors and they were in turn taken over by others who came after them.

[8] Initially the plaintiff was engaged to carry out hacking and demolition works only whilst the drawings and structural plans as well as the BQ were drawn up. The contract was very rudimentary in the exchange of some letters and emails between the parties with many changes along the way.

[9] The plaintiff's main witness and the one at the site doing and directing the works was Mr Victor Jagadeesan a/l S Joseph PW1, the founder and director of the plaintiff. He testified that though the initial demolition work

started in September 2013, the whole works were suspended from December 2013 to early March 2014. The fall-out was because on 19 December 2013, the defendants terminated the services of the second project architect as well as the consultants, Jururunding MK by way of an email.

[10] Only on 21 February 2014 did D1 write to call for a 'Consultants Meeting' to resolve outstanding issues prior to the commencement of renovation works on 1 March 2014. By then and as late as 27 March 2014, the plaintiff was still unsure as to whether it would be awarded the main contract works and that prompted the email of that date. There was also no way for the project price and cost to be fixed at that stage as all drawings and plans were still in flux and had yet to be settled and finalised.

[11] Until the finalisation of the contract sum, the plaintiff made claims for works done, and the defendants paid, on an ad hoc and progressive basis, without any certifications by either the consultants or the architect. This was the case with payments nos 1 to 5 for the sum of RM800,000 from 23 October 2013 up till 14 August 2014.

[12] After some negotiations, the parties settled on a final lump sum contract price of RM2,195,000 ('original contract price') with a schedule of prices and the plaintiff's scope of works which included the Building and M&E works (see CBOD3, pp 472–473).

[13] D1 later required in meeting No 7 on 28 October 2014 that payments shall no longer be made to the plaintiff until all claims are 'verified' and 'recommended' by the architect (see CBOD3, p 444, Item 07.2.03).

[14] The plaintiff submitted progress claim No 3 dated 27 October 2014 (see CBOD3, pp 435–439), which was certified by the fourth Project Architect Ar Vincent Lo on 4 November 2014 by way of certificate of payment No 3 with a total value of works executed by the plaintiff as at 27 October 2014 at RM987,750; approximately 45% (rounded down) of the original contract price of RM2,195,000 (see CBOD1, p 3). The workings and valuation for the said certificate of payment 3 can be found at CBOD3, pp 463–466.

[15] At a meeting held at the fourth architect's office on 11 November 2014 the defendants omitted from the plaintiff's scope of works certain items such as water proofing, tiling and plaster ceiling (see CBOD3, pp 484–487) for the sum of RM664,450. The revised, final price of the contract became RM1,531,800 ('revised contract price').

A **[16]** The plaintiff was continuing to carry out the project works when D1 suddenly, on the spot and without notice orally terminated the plaintiff on 5 December 2014. The plaintiff said that this termination was unlawful.

B **[17]** Strict instructions were given to bar the plaintiff from entering the project site and from retrieving their materials and equipment (see CBOD4, pp 567–572). The plaintiff lodged a police report (CBOD4, pp 553–554) to protect its interest.

C **[18]** Architect Ar Vincent Lo wrote to the defendants requesting the defendants to appoint a quantity surveyor ('QS') to assess and value the plaintiff's works done as at the termination. This fell on deaf ears and the defendants proceeded to appoint subcontractors to complete the balance works at site, inclusive of those omitted or not originally in the plaintiff's scope of
D works.

[19] Architect Ar Vincent Lo persevered and duly wrote to the second M&E Consultant, represented by its director PW3, requesting PW3 to assess and certify the value of the plaintiff's M&E works (electrical, sanitary and
E plumbing) completed. PW3 issued around March 2015 recommendations of the plaintiff's value of M&E works with a total value of RM404,668 (see CBOD4, pp 631–632, 635–638).

F **[20]** The architect Ar Vincent Lo had also issued various valuations of the plaintiff's works, certifying that the value of the plaintiff's building works (not inclusive of M&E works) to be RM871,615 (CBD4, pp 589–590, 646 and 692).

G PLEADINGS

[21] The plaintiff claimed that the termination was unlawful and that the defendants in breach of the contract had failed to pay them for the works done consisting of building works, M&E works and variation works at the express
H instruction of the defendants.

[22] The plaintiff claimed that the delays were caused by the defendants. At the trial the plaintiff adduced evidence that the complete set of drawings came in dribs and drabs and based on the evidence as summarised at p 5 of the
I plaintiff's further submission the architectural drawings were given in full only on 22 September 2014, the C&S drawings were given on 12 September 2014 and the ID drawings were given on 17 November 2014 and as a result of the late handing over of the ID drawings the M&E works were not completely finalised even at point of oral termination on 5 December 2014.

[23] D1 and D2 in their defence and counterclaim pleaded that the plaintiff had failed to proceed with the works regularly and diligently and that the termination was valid and lawful. The said defendants pleaded that the plaintiff's delay in completion had caused a delay in the commencement of business for the hotel causing a loss to the tune of about RM1m. There were also complaints of defective works of the plaintiff and the said defendants claimed for the costs of rectification as well as a return of an advance of RM800,000.

[24] D3 filed a separate defence denying that there was any privity of contract between the plaintiff and them and asking the suit against them to be dismissed.

PRAYERS

[25] The plaintiff had prayed for the sum of RM522,397.80 being payment for the value of the plaintiff's works as at the date of termination together with interest at the rate of 5%pa from the date of filing of the statement of claim until the date of full and final payment.

[26] Though asserting that the termination was unlawful, the plaintiff confirmed through their learned counsel that they are not claiming for loss of profits.

[27] D1 and D2 counterclaimed the sum of RM2,157,003.38 made up of:

(a) loss of net profit of RM1,079,510.88 as a result of the delay by the plaintiff causing the delay to the operations of 'Royce Hotel';

(b) loan of RM800,000 to the plaintiff; and

(c) damages in the sum of RM277,492.50 for the defective, and non-compliant works of the plaintiff.

[28] The said defendants also prayed for interest at 5%pa on the sum of RM2,157,003.38 from the date of judgment until the date of full payment.

PRELIMINARIES

[29] The plaintiff had sued the defendants collectively as instructions had come sometimes from D1 and other times from D2 and/or D3. There is no objection or anything raised before or during the trial or even in the submissions of the defendants as to why the plaintiff cannot consider the three defendants as acting collectively more as a single economic entity where they would be liable jointly and severally. In fact learned counsel for the defendants confirmed that he would be focusing on the issue of liability where the claims

A and counterclaims are concerned and not so much on whether or not D3 is a party to the contract. His submissions are silent on why the plaintiff's claim against D3 should be dismissed or struck out on ground of no privity of contract between the plaintiff and D3.

B **[30]** In any event the matter is a non-issue where the defendants in D1 and D2 are concerned for they collectively too had mounted a counterclaim against the plaintiff. See pp 57–58 bundle of pleadings.

PRINCIPLES

C

Whether the plaintiff are entitled to sue all three defendants as parties to the oral contract

D **[31]** Whilst the silence of the defendants in their written submissions on whether or not D3 is a party to the contract is singularly significant, this court would nevertheless proceed on whether the defendants are estopped from contending that they are not parties to the contract as a whole.

E **[32]** In a case where there is no formal written contract executed but that the written documents showed all the three defendants had varying degrees of involvement in the oral contract and though ordinarily are separate juristic entities but had held themselves out as operating as a single economic unit for all practical purposes, the defendants whether jointly or singly are estopped from contending otherwise and may be sued together.

F

[33] Here DW1, who is also D1, had at all times represented himself to PW1 as the owner of the project. PW1 had also at all times dealt with DW1 personally, and it was DW1 who had awarded the contract to the plaintiff.

G

[34] Learned counsel for the plaintiff highlighted that the quotation document as found in CBOD1, pp 12–34 as well as DBOD2 clearly states that the owner and employer of the project is DW1, as stated at p 12 CBOD1. The tenderers Greatlight Builder Sdn Bhd (see DBOD2, p 59) and Tenaga-Ed Sdn H Bhd (see DBOD2, p 112) also clearly wrote and addressed their completed tender quotation document to their perceived owner of the project, DW1.

[35] D1's identity as the client and party to the contract was also admitted by DW1 in cross-examination (see notes of evidence Vol 2, Day 12, p 475).

I

[36] From the above reproduction from the notes of evidence, DW1 made reference to M&E plans from the second M&E consultant in CBOD3, p 392 wherein the owner in the right hand box is listed as DW1 personally 'c/o' or 'in the care of' CMC i-Care Sdn Bhd (D2).

[37] I agree with the plaintiff that this 'c/o' refers to an address at which a person may be contacted (see PBOA, p 42). A

[38] DW1 as the employer also made payments in his personal capacity from his own personal bank account, as can be seen in CBOD1, pp 8, 47, 53, 110 and CBOD2, pp 240 and 356 and tabulated in PW1WS1, p 3 for a total sum of RM924,975. B

[39] At the outset, the contract appears to be between the plaintiff and D1 personally. This was put to DW1 in cross-examination in notes of evidence Vol 2, Day 12, pp 477–479 that the only mention of D2 being made party to the contract was by way of email dated 4 November 2014 in CBOD3, pp 449–450. The sender of the email was stated as: C

> Ravi
>
> Cmc I-Care Sdn Bhd. D

[40] Even in that email D1 is used interchangeably with D2 as in:

> We have paid RM800,000.00 which is more than 30% of the project cost. E

[41] The evidence given is that the payments had come from D1 personally and the counterclaim for this amount was made by D1 though collectively claimed by D1 and D2 jointly at prayer 7 of the defence and counterclaim of D1 and D2 at p 58 of the bundle of pleadings. F

[42] To compound and complicate the matter further, the project title and signboard prepared by the third project architect, Messrs Laurent Lim Architect and put up by the project site (see CBOD1 pp 11, 179–181; and CBOD2, pp 191–192), D3 had been named as the employer/client for whom the project was being carried out. Ever since the signboard was put in place at the project site on the third project architect's instructions around May 2014, D1 had on numerous occasions visited and inspected the project site, yet made no comment, objection to or instruction to amend the clearly visible project signboard. G H

[43] D1 in his communication with the plaintiff had on several occasions indicated that he acted in his capacity as CEO of D3 and one such instance is an email dated 11 November 2013 sent by D1 and D3 to PW1 (see CBOD1, p 51). I

[44] D3 had also issued instructions and communicated with the plaintiff and project consultants regarding the project works. For instance, by way of an

email dated 19 September 2013 received by PW1, the General Manager of D3, one Harps Sandhu, called for a meeting and provided an action plan for the project (see CBOD1, p 36).

[45] The fourth project architect, Messrs Vincent jh Lo Chartered Architect also issued communications and certificates to D1 and D3 addressed to D1 in his capacity as CEO/director of D3, as seen in the letter dated 4 November 2014 enclosing certificate of payment No 3 and also the Certificate itself (see CBOD1, pp 1–3).

[46] All claims of the plaintiff had at all material times been addressed to D1 orally. It was only by way of an email dated 5 November 2014 (close to the date of the defendants' unlawful termination of the plaintiff's employment), addressed to the plaintiff's Admin Executive, Miss Annie Joseph, that the defendants requested that all invoices be addressed to CMC I-Care Sdn Bhd (D2) and not CMC I-Source (D3) (see CBOD1, p 4).

[47] After the plaintiff's termination by the defendants, the payment of AM-Advance Elevator (M) Sdn Bhd, the lift supplier/contractor was subsequently made by D3 (see CBOD4, p 565).

[48] The above factual matrix brings to mind the dicta of the Court of Appeal in *Epic Quest Sdn Bhd v Sheila Elenor De Costa* [2011] 8 CLJ 518 as follows:

> [9] From what is set out above it was evident to us that when dealing with the respondent, the Titijaya Group of Companies including the appellants and SP Lim *had deliberately ignored the separate corporate personalities of the companies, and operated as one group enterprise.* The payment of the respondent's legal charges also reflected this where it can be seen that when the respondent rendered her charges to a company within the group, the respondent's charges would be paid by any one of the Titijaya Group of Companies even though the paying company did not directly receive the respondent's services. *Having themselves ignored it when dealing with her, the appellants cannot now be allowed to insist on their separate corporate personality to defeat the respondent's general lien.* In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 Chong Siew Fai CJ (Sabah and Sarawak) said that the corporate veil cannot be used as an instrument to evade a contractual obligation. (Emphasis added.)

[49] Where the human persona of D1 has merged with the corporate juristic personae of D2 and D2, both under his control and management and employed by D1 interchangeably as and when convenient to him, then in such a case the controlling persona may be sued together with the vehicles deployed by him in executing and operating the project.

[50] Surely the plaintiff's claim should not be defeated on the sole ground that when D1 and D2 are sued, they then would say that D3 is liable and when D3 is sued D3 then said D1 or D2 alone is liable.

[51] Conflation of legal personae cleverly constructed should not be a cover to evade contractual obligations or to confuse the plaintiff as to the real identities of the contracting parties.

[52] In a case like this where the defendants, under the control of DW1 as D1 had represented themselves collectively as a single unity acting in concert, they cannot now dissociate themselves from their collective contractual obligations to the plaintiff under the oral contract.

Whether the plaintiff had proved the sum due for the building works and the M&E works executed by them

[53] Irrespective of the validity of the termination by the defendant, the plaintiff would still have to be paid for the works executed by them up to the date of the termination. That is unaffected by the termination though if the termination by the defendants was valid and lawful, then the defendants might justify their claim for the losses arising from the delay caused by the plaintiff.

[54] The M&E consultant at the material time who could independently testify on the works done by the plaintiff would be PW2 Ir Tan Boon Ann and DW2 Ar Vincent Lo.

[55] PW2 was the second M&E consultant engaged by the defendants and under their pay-roll. He is a director with SK Perunding Sdn Bhd and was appointed on 25 November 2013 to provide M&E consultancy after the previous M&E Consultant Jururunding IMK Sdn Bhd was discharged.

[56] The M&E works were done under his supervision and direction. There is no reason why this court should doubt the professional judgment and expertise that he would bring to his job.

[57] The common denominator of both the professionals in PW3 and DW2 was that they could only verify and assess the value of work done by the plaintiff but that certification is not within their scope of work. Both refused to touch certification as a hot potato and avoided it like plague!

[58] They both said that eventually the QS to be appointed is to certify and so without certification the architect DW2 said he cannot issue any certificate of payment for the progress claims submitted by the plaintiff. The fact

A remained that the defendants did not appoint any QS to certify the value of works done throughout the period when the plaintiff was executing the works.

[59] PW3 was prepared to stand by his recommendation of the value of M&E works done and he agreed that it is not incorrect though the best person would be the QS to confirm and certify the value of the M&E works.

[60] As for the architect DW2, though the scope of his appointment did not include quantifying and certifying the M&E works done, yet DW2 accepted responsibility for recommending the value of such works done and certainly for the building works done which he had certified before in a certificate No 3.

[61] PW3 Ir Tan was the best person to verify the value and percentage of completion of the plaintiff's M&E works as at the date of termination. He explained that the plaintiff's scope of M&E works were only to complete the internal building electrical works up till the main distribution box, beyond which up till the power source was outside the plaintiff's scope of works and was not priced into the contract.

[62] PW3 confirmed that none of the plaintiff's works were rejected or found to be defective. At any rate if the works were not properly done or are found to be defective, he would not be recommending payment.

[63] He stated as a matter of fact that the defendants were poor and slow paymasters. Following the plaintiff's termination by the defendants, no further services were provided by PW3, whether it was certifying the balance works done by the third party contractors, approving the M&E works or issuing any certificates or applications relevant to the project's completion.

[64] What then is the value of the works as verified, assessed and recommended by these two professionals? It cannot be seriously disputed that the plaintiff's works consisted of three components:

(i) the value of the building works;

(ii) the value of the M&E (piping, sanitary and electrical) works; and

(iii) the value of the VO works.

(i) The value of the building works

[65] I agree with learned counsel for the plaintiff that despite DW2's insistence that his valuation of works done to date (building works only) in CBOD4, p 692 is not certification, it is nevertheless a valuation and quantification by DW2 as a professional architect with his experience and

expertise being brought to bear on the said works and to attribute and quantify a value of RM871,615. DW2's valuation and quantification can be professionally justified.

[66] In the absence of evidence to the contrary it is safe to accept the evidence of DW2 who did not want to commit himself to confirm that it is a certification probably because he did not want to be seen as favouring the plaintiff. There being no QS appointed at all material times, the architect in DW2 was for all practical purposes the superintending officer ('SO') for the project.

(ii) M&E (piping, sanitary and electrical) works

[67] PW3 gave evidence supported by documents to substantiate that the value of the M&E works is RM404,668 as follows:

Works	Value (RM)	Reference
Electrical Works	221,200	CBOD 4, pp 631–633
Sanitary Piping Works	78,300	CBOD 4, pp 635–637
Cold Water Piping Works	105,168	CBOD 4, pp 635–638
Total	404,668	

[68] PW3 in professionally assessing and valuing the M&E works did not approve everything that the plaintiff had claimed but where appropriate he had applied his professional judgment to the claims and valued and verified them accordingly. We can see this in CBOD pp 632 and 637–638.

[69] The inspection was done on 17 November 2014 before the termination. Even accepting that there might be a margin of error, it is not totally inaccurate as the defendants would have us believe. Where the defendants did not engage their own QS or SO, they cannot deny the plaintiff's claim for work done on the flimsy excuse that the works were not certified; a matter which even the defendants' own witness in DW2 agreed.

[70] From 17 November 2014 to date of termination on 5 December 2014 there were also continuing works but I am prepared, based on the peculiar circumstance where no one owns up to be the SO or QS certifying, to take the best evidence as coming from the M&E consultant engineer in PW3.

[71] The evidence of the so-called expert QS DW4 Datin Sr Sofiah bt Mohd Salim, engaged by the defendants is not helpful as she did not go to the site and whatever works done by the plaintiff had already been taken over by the new contractor appointed. Her own evidence was that nobody knows the work

done by the plaintiff unless the professional consultant had been there throughout the execution of the project.

[72] Fortuitously for the plaintiff there were the M&E consultant and the architect who were there during the material time. It would be more accurate to say nobody knows but surely the M&E consultant engineer in PW3 and the architect in DW2 and their combined evidence as to the value of work done by the plaintiff would be the best evidence we can have in a case where the defendants could not be bothered about engaging a QS but found it convenient to pay the plaintiff as and when their CEO and director in D1 felt like it.

[73] DW4's evidence suffered another deficiency in that in her report in DBOD3, p 4, under 'References', she admitted that she had referred to records not provided in the bundles of documents filed with the court; which records were received via emails from the defendants contrary to this court's direction and ruling that the QS report be prepared based on documents already produced in the bundles of documents filed.

[74] The divergence in her assessment of the sum of RM112,000 left outstanding to the plaintiff for the works done until termination as compared to the sums assessed and valued by the M&E consultant PW3 and the architect DW2 lies in the methodology she had used to arrive at her figure, constrained no doubt by the fact that she had only come in after the completion of the project. DW4 had proceeded to find the difference between the final/revised contract price post-omission of the plaintiff's works and the alleged completion cost of RM533,003.60. See notes of evidence Vol 2, Day 16, pp 648–656.

[75] The construction costs post termination would have fluctuated and may have increased (or decreased) in 2015 when the defendants engaged the third party subcontractors to that in 2014 when the plaintiff and defendants finalised the contract sum. DW4 did not review or verify the defendants' purported quotations, invoices, vouchers and receipts which were not completely reliable as DW1 had admitted in cross-examination that some of DW4's figures and calculations are wrong, as seen in notes of evidence Vol 2, Day 19, pp 781–782.

[76] DW4's expert report is premised on the erroneous finding that there were no variation orders works carried out by the plaintiff. DW4 admitted she was not familiar with the plaintiff's scope of works and she made little reference to the building plans with which she was not familiar.

[77] DW4 had completely disregarded the valuation of DW2, the professional architect of the building works at RM871,615 as well as the valuations recommended by PW3, the second M&E consultant who had valued the plaintiff's M&E works at RM404,668 without giving any cogent reasons for disagreeing with their valuation and assessment of the works done.

[78] To allow the defendants the exit route of not having to pay the plaintiff for the works done on account of no certification would be to allow the defendants to take advantage of their own neglect or worse still, their stubborn refusal to engage one to verify and certify the works.

[79] That may be an easy way out for the defendants but I cannot accept that as surely some credit can be given to the architect who verified and assessed the building works done and the consultant engineer who verified and recommended for the amount of M&E works done. Here it is not a case of a construction of a multi-storey complex but a renovation of an office building into a boutique hotel.

[80] I cannot see how this kind of a valuation and verification cannot be done by a properly qualified and trained engineer in PW3 or an architect in DW2.

[81] DW2 himself under cross-examination was prepared to accept the fact that there should not be much material difference between the valuation of the M&E consultant and that of a QS if one was finally appointed. In fact any disparities would be more than evened out in favour of the defendants as the plaintiff accepts the fact that it is now quite impossible to verify and assessed the work done between the inspection on 17 November 2014 and the termination on 5 December 2014.

[82] The contractor who subsequently took over the works had not been called by the defendants to show the scope for works done by them and the payments made out. The unreasonable refusal of the defendants to have a joint inspection to verify the works done by the plaintiff as at the date of termination on 5 December 2014 had compounded the problem.

[83] I would accept on the balance of probabilities the values of M&E works done as valued and verified and recommended by PW3.

Calculation with respect to (i) and (ii) above

[84] The value of work done for the building works and the M&E works came up to RM1,275,833 taking into account the sum of RM871,165 for building works as certified by the architect and M&E works of RM404,668.

A See p 5 of the plaintiff's further submission No 1 and also p 12 BOP. Out of this a sum of RM885,475 had been received by the plaintiff and after deducting for building works of RM871,165, there is an overpayment of RM14,310.

B **[85]** The total amount of monies paid to the plaintiff is RM924,750 (PW1WS1, p 3, Q&A4). However, out of this sum, the plaintiff made payments of RM39,500 on behalf of the defendants. This consisted of RM36,000 to AM-Advance as down payment for lifts seen in CBOD1, p 54 and RM3,500 to the first M&E consultant, Krishnan. These figures have not been disputed by the defendants, as seen in DBOD3, p 4 where DW4 stated C that RM924,975 was paid as payments for work done for which RM39,500 was to repay money spent by the plaintiff on behalf of the defendants.

[86] After taking into consideration the net payment received by the plaintiff and also the undisputed amount overpaid of RM14,310 there is a balance of D RM390,358 left outstanding to the plaintiff. This shall carry interest at 5%pa from date of statement of claim to realisation.

Whether the plaintiff had proved the variation works carried out by them

E **[87]** The plaintiff's scope of works as in the agreed original scope of works is found in CBOD3, pp 484–487 and 513 and incorporating the VO's and omissions found in CBOD3, pp 513, 518–521.

F **[88]** As for VO1, VO3 and VO4 I am satisfied that this has been approved by the architect and we can see this at p 589 CBOD4 where 100% of the VO works had been valued by the architect in his letter to D1 dated 18 January 2015.

G **[89]** DW2 was firm and forthright in confirming that these VOs were necessitated by change in the plans and designs of the defendants and any variation to accommodate the changes as approved and confirmed by the architect is an approved VO.

H **[90]** It is also necessary to note that the plaintiff's claim for variation order No 4 was made in progress claim No 3, item 15 (CBOD3, p 438) and was subsequently converted to variation order No 4 and was approved by the DW2 on 6 November 2014 (CBOD3, pp 463–466). This variation order No 4 was also approved by the architect DW2 in his valuation of works done dated I 18 February 2015 (CBOD4, p 589).

[91] Though the architect DW2 was a witness of the defendants yet his evidence which was uncontroverted stood as part of the defendants' case from which the defendants cannot dissociate.

[92] DW2 effectively by his evidence, had retrospectively (during the trial) approved, sanctioned and certified the VO works. Even DW4 the QS expert called by the defendants, in the course of cross-examination in notes of evidence Vol 2, Day 14, pp 591–593 admitted that in the standard form of PAM contract, which is the most widely used construction contract in Malaysia, a VO can be retrospectively sanctioned by an architect.

[93] Learned counsel for the plaintiff referred to this helpful passage in Julian Bailey's book on *Construction Law* on variations of contract, where in paras 7.40–7.46 it is stated that the 'absence of written variation instruction no bar to recovery' as follows:

> *7.40* There are certain *circumstances where the absence of a written variation instruction will not prevent a contractor from being entitled to payment* (in circumstances where the applicable contract states that the contractor is only entitled to additional payment if a written variation instruction is given). These circumstances are as follows:
>
> • The *owner has conducted itself so as to waive its right to rely upon the clause requiring that a written instruction be given*, or the owner is *estopped from seeking to defend the contractor's claim for additional payment* on the basis of the particular contractual provision.
>
> *7.41* In relation to waiver, an *owner will be taken to have waived its right* ... where (i) the owner, or its *agent, has requested that the additional work be performed, albeit without issuing an instruction to this effect* ...; (ii) the *contractor has performed the work*; and (iii) the *owner permitted the contractor to perform the relevant work, without stopping the contractor or pointing out that the contractor is not entitled to additional payment*. The contractor's right to payment, in such cases, may be grounded in restitution, on the basis that the owner would be unjustly enriched were it not to pay the contractor for the work that the contractor performed at the owner's request.
>
> *7.42* Looking at the matter in another way, *where an owner (including its agent) has conducted itself so as to convey a clear and unambiguous promise that it would not insist upon the contract being followed to the letter*, and that it would not refuse to compensate the contractor for performing work pursuant to an informal instruction, the *owner will be estopped from refusing to make payment* on the basis that the terms of the contract deny the contractor an entitlement to compensation. (Emphasis added.)

[94] I am more than satisfied that the above requirements have been met to satisfy the exception that the owner/defendants having by their conduct waived their right to insist on written instruction for variation. This is incontrovertible in the light of the following as pointed out by the plaintiff:

(a) the defendants' agents, ie consultants and architects had requested additional works be done by way of revised drawings and plans;

(b) the plaintiff had performed and completed the VO works in the reasonable expectation of being paid for that work, as confirmed, sanctioned and retrospectively certified by DW2; and

(c) the defendants and/or their agent in the architect DW2 had permitted and did not stop the plaintiff, if indeed it was not authorised, from carrying out the VO works.

[95] The defendants are thus estopped from denying the plaintiff of the VO works done. Therefore I would allow RM76,800 as the VOs claims together with interest at 5%pa from date of statement of claim to realisation.

Whether the plaintiff had proved the value of the materials and equipment left at the site after the termination of the contract

[96] There were materials and equipment of the plaintiff left behind at the site when they were terminated on the spot. I can believe PW1 when he said that he was not given time to retrieve those materials and equipment at site. The relevant documents have been exhibited and the photos taken exhibited.

[97] The contemporaneous evidence is that DW1 ordered the plaintiff to vacate the project site with immediate effect and barred the plaintiff and their agents' entry or return to the project site to retrieve the plaintiff's materials, equipment and tools as can be seen in D1's email dated 5 December 2014 at CBOD3, pp 500–502.

[98] DW1 wrote an email at 8.33pm on the same date 5 December 2014 to PW1 stating that the plaintiff had to take their materials and equipment and remove their personnel on the same day itself, failing which all items left behind became the defendants'. That deadline was unreasonable. The plaintiff was caught unaware and there simply was no time to retrieve everything as they were continuing with the works when they were suddenly ordered to vacate the project site.

[99] On 6 December 2014, the plaintiff sent their agents and employees to retrieve their belongings but were barred by the defendants who had engaged a security guard company to bar the plaintiff from entering the project site.

[100] The plaintiff lodged a police report against the defendants dated 9 December 2014 (see CBOD4, pp 553–554). On the other hand the defendants had not written to deny that they had prevented the plaintiff from retrieving these materials and equipment. Neither was there any contemporaneous report lodged by the defendants to state that the plaintiff by unlawfully leaving their materials and equipment at the project site was

trespassing or unlawfully occupying their project site and that they shall not be responsible for the materials and the equipment.

[101] The plaintiff on 27 January 2015 wrote to DW2 enclosing the plaintiff's claim for materials and equipment left at the site worth RM55,293.80 (see CBOD4, pp 566–573).

No	Type	Amount (RM)
1.	Tools & Machinery	12,383.50
2.	Material	29,491.30
3.	Construction Material	480.00
4.	Company Property	12,885.00
Total		55,239.80

[102] The plaintiff claimed for RM55,239.80 as follows (CBOD4, p 567):

[103] A further breakdown of the above is found in CBOD4, p 570:

No in CBOD4	Description	CBOD3 Picture Reference
2 & 4	Plaster Ceiling	pp 533 & 544
3	Manhole	p 533
5	Wires — Mega Cables	pp 536 & 537
	Cable trunkings	p 536
7	Vibrator Machines & Welding Unit	p 536
8	Earth Cables (Copper)	p 529
9	Light weight blocks, skim coat base & cement adhesive	pp 530, 532 & 535
10	Plumbing Materials	pp 531, 534 & 535
p 569 item 5	Mini Hoist	p 532

[104] DW1 said that the defendants had fully paid for the materials and equipment. Their own witness in the architect DW2 did not think so and his stand is supported by the certificate of payment No 3 at CBOD1, p 3 where the amount in respect of materials is nil. Further, there was no payment in respect of 'Preliminaries' or procurement.

[105] I would rather believe the architect DW2 who had no personal interest in the matter other than to discharge his professional obligations and duties.

[106] Though the claim made is RM55,239.80, I have to take into consideration depreciation of the materials and the fact that the plaintiff did not show the replacement costs of these equipment and there is also a need to

mitigate loss. The tools and machinery were some one to three years old. Credit however must also be given for the fact that the scaffolding had to be rented by the plaintiff from third parties.

[107] I therefore would only allow, taking the above into consideration, a sum of RM30,000 and this too shall carry interest at 5%pa from the date of the statement of claim to realisation.

Whether the defendants' termination of the contract is valid and lawful in the circumstances of the case

[108] To begin with there was no completion date in the contract between the plaintiff and the defendants. When the plaintiff was appointed around September 2013 to be solely responsible for hacking and demolition works, no completion date was set for the plaintiff.

[109] The initial works were suspended by the defendants from 19 December 2013–1 March 2014 as the entire team of professionals including Jururunding MK and the second architect were terminated and dismissed and a new team reconstituted. It was a suspension of the works for 2 1/2 months which was not translated into any extension of time to the plaintiff. Indeed there was no extension of time provision in the contract.

[110] The dicta of the Supreme Court in *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25 is instructive as follows:

> To recapitulate, in the present case, it is not disputed that under the said contract, the date for completion of the works was 18 April 1985. Yet, by such date, most floors of the hotel were still not handed over to the judgment debtor. It is also common ground that there is *no provision in the said contract, particularly cll 21 and 23 for any extension of time to complete the works on account of delay in handing-over of the site*. In fact, the evidence of Patrick William Bone (GW1), the design consultant (at p 53 of the appeal record), confirmed that there was no extension of time given for the late handing-over. He agreed that all the areas were handed over late. Thus, *if the employer handed over the site late which led to the delay on the part of the contractor to complete the works, it is patently clear, based on the principles cited above, that the employer should not be entitled to claim for liquidated damages under the said contract because, by his omission to give possession of the site on time, the time for completion becomes 'at large'* and there was no date from which the damages could be assessed. (Emphasis added.)

[111] The defendants had referred to the completion date deadline of 28 June 2014 found in CBOD1, p 155, which is an email issued by one Asrul Sari of Lumira Hotels, the defendants' appointed hotel consultants. However this was recorded not by either of the parties to the contract, but a consultant of the defendants. Their services were terminated together with that of the other

consultants and the works were suspended. I agree with the plaintiff that this document alone is insufficient to evidence that parties intended time to be of the essence in the contract.

[112] After the recommencement of the works the complete set of drawings came in dribs and drabs and based on the evidence as summarised at p 5 of the plaintiff's further submission. The architectural drawings were given in full only on 22 September 2014 CBOD3 p 379, the C&S drawings were given on 12 September 2014 CBOD3 p 375 and the ID drawings were given on 17 November 2014 CBOD3 p 480 and as a result of the late handing over of the ID drawings the M&E drawings were not completely finalised even at point of oral termination on 5 December 2014. PW3 Ir Tan confirmed that until the ID drawings had come in the M&E drawings could not be finalised as the trunking, mechanical and electrical wiring and air-conditioning must not interfere with the ID works. DW2 Architect Vincent also agreed with that. A summary of the various dates for the receipts of the drawings is as stated below:

Drawings	Date	Evidence
Architectural	22 September 2014	CBOD3, p 379
C&S	12 September 2014	CBOD3, p 375
ID	2 December 2014	CBOD3, p 480
M&E	Never finalised due to ID revisions	PW3WS, Q&A4
Termination	5 December 2014	

[113] The changes in the team of architects and consultants resulted in numerous changes to the project's designs, plans and parameters. There were also the three VOs referred to above which this court had allowed. The various changing plans and drawings also supported the fact that time cannot be of the essence in the contract.

[114] Indeed the plaintiff's scope and price for their works were only firmed up and finalised around October and November 2014. The defendants were therefore estopped from terminating the contract on 5 December 2014 when they had already waived their right to terminate the contract in June 2014 and elected to allow the plaintiff to continue with the works.

[115] This is a case, coming within the principle propounded by the Federal Court in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 where by giving clear instructions on further works, changes, VOs and drawings after the supposed date of completion the defendants have waived their right to terminate the contract by their election to affirm the contract. The Federal Court opined as follows at p 153:

In modern law of contract *prima facie stipulation as to time is not of the essence of a contract, unless the parties agree that it be so* (see Lord Simon of *Glaisdale in United Scientific v Burnley Council* [1978] AC 904 at pp 940 and 944. In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See 9 *Halsbury's Laws of England* (4th Ed) para 538, p 370).

In this case obviously *he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom*. He must be deemed to have elected the agreement as still continuing. (Emphasis added.)

[116] In a similar vein, learned counsel for the plaintiff also referred to the dicta of Justice Richard Malanjum CJSS (as the former CJ then was) in the Federal Court case of *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 as follows:

Question Two — Effect of s 56(2) of the Contracts Act 1950

[25] Question two implies that it is a principle of law that in order for time to be of the essence it must be stipulated in a given contract. With respect, such an impression, whether intended or otherwise, is erroneous. On the contrary, it is trite law that a *contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract'* (see *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269). Thus, *whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties*. There is no necessity in law that a clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence.

[26] In the case of *Mohammed Ibrahim & Anor v Mohammed Abdul Razzak* AIR 2007 AP 294 the High Court of India observed that 'it is settled law, merely because there is a mention in the agreement making time as essence of the contract, it does not mean that such time is made an essence of the contract. The *court has to decide the same while taking in to consideration the intention of parties in making such a stipulation, their conduct and surrounding circumstances*'.

...

[28] We are of course conscious that in any given contract where time is not of the essence, whether express or implied, then s 56(2) is relevant. In such case the innocent party is not entitled to terminate the contract and is only entitled to

damages. It is under s 56(1) where time is of the essence that the innocent party may exercise its right to terminate the contract.

[29] The distinction between the two sub-sections of s 56 has been succinctly explained by Cheong May Fong in *Civil Remedies in Malaysia* (Sweet & Maxwell Asia 2007), at p 38 where the learned author said the following:

> In both s 56(1) and 56(2), a specified date is fixed for performance. However, under s 56(1), there is an intention that time should be of the essence of the contract but there is no similar intention under s 56(2). Thus, the effect of a breach to perform at the time stipulated under s 56(1) where time is of the essence cause the contract to be voidable and gives the innocent party the option whether to terminate (rescind) or carry on (affirm) the contract. On the other hand, a breach to perform within the time stipulated under s 56(2) where time is not of the essence, the contract is not voidable and the innocent party is only entitled to compensation for the loss suffered as a result of the breach. (Emphasis added.)

[117] DW2, the fourth architect confirmed under cross-examination that when he came on board in June 2014, he found that the building plans alleged by the defendants to have been provided to the plaintiff as at September 2013 were incomplete and impossible to comply with due to illegality and non-compliance with building codes and building by-laws. The building therefore could not have been completed based on the drawings provided by the previous architect and certainly could not have completed by June 2014 and this through no fault of the plaintiff (see CBOD1, p 12).

[118] DW1 in his email terminating the first team of consultants on 26 December 2013 had stated the building plans and drawings to be 'incomplete', wrong and mistake-ridden (see CBOD1, pp 55–58).

[119] All these were delays caused by the defendants and they cannot now take advantage of their wrongs and penalise the plaintiff with claims for damages arising out of the so-called late completion of the hotel.

[120] There were evidence too on indecisiveness on the part of DW1, due no less to lack of experience and made worse by having at the same time to devote himself to a full-time job as a pilot.

[121] For example DW2 had emailed on 12 August 2014 to D1 requesting him to finalise and provide updated electrical and ID plans, together with finalising other room designs (see CBOD2, p 342).

[122] The second M&E consultant also emailed to the defendants on 7 September 2014 concerning the project's water tank layout in that 'the client

has to instruct us to revise our design' and 'Lastly, we are waiting your instruction to move forward' (see CBOD2, pp 363–364).

[123] This is a case where the time of completion was not stated in the contract between the parties and as such time would not be of the essence. Time can become of the essence if the defendants were then to give reasonable notice to the plaintiff to fix a time of completion.

[124] Here the defendants are relying on an email from the plaintiff dated 15 September 2014 at DBOD 1 pp 71–73; p 462 CBOD3. This is nothing more but a target date of 22 December 2014 for completion provided the complete set of drawings are received.

[125] I accept the plaintiff's explanation that without the ID drawings being received and it was only received on 17 November 2014 the M&E works cannot be fully completed. Here is also a case where the defendants themselves had caused delay to the completion of the project by the late delivery of the drawings and as such they cannot terminate the plaintiff without reasonable time being given.

[126] The Federal Court in *Sim Chio Huat* deliberated on such a scenario and cited *Hudson's Building and Engineering Contracts* (10th Ed) and said at p 155 as follows:

> Amongst the conclusions reached by the learned author after considering these cases is that in cases *where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorised by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause* because *by such acts in the words of Parke B in Holme v Guppy and Lord Denning MR in Trollope and Colls 'the time becomes at large'.* Consequently there is no date from which damages could run and therefore no damages could be claimed.
>
> In the present case, not only did the agreement contain no extension clause it also contained no clause authorising extra work. This extra work must at least have caused part of the delay though it might not have caused the whole delay. Applying the principle stated above, we are of the opinion that cll 20 and 21 became invalidated and that no damages should have been allowed under them. (Emphasis added.)

[127] Indeed time for completion had become at large because of the delay caused by the defendants and here the plaintiff was still diligently executing the works when the termination was done on the spot and orally on 5 December 2014. By that time the completion date, assuming there was one targeting completion on 22 December 2014, was not up yet.

[128] There is no termination clause in the contract and thus unless the plaintiff had repudiated the contract, the defendants had no right to terminate the contract. Here the plaintiff had not repudiated the contract and indeed was still continuing with the works with all due diligence and that the defendants had been guilty of causing the delay and as such the on-the-spot termination is unlawful in the circumstances of the case.

[129] Even allowing for valid reason for terminating the contract under common law though not spelt out by D1 when terminating the contract, this Court finds that D2's termination based on delay on the part of the plaintiff is not valid or justified for the reasons given above.

[130] Justice Zainun Ali FCJ in the Federal Court judgment of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 reiterated that though notice of the reasons for the termination need not be given in all cases nevertheless observed as follows:

> [23] It is trite law that 'if a party refuses to perform a contract (ie wishes to terminate), giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal' (see *Chitty on Contract* (32nd Ed) E Peel (eds) at 24–014). *The question of valid termination, therefore, turns upon whether or not there was in fact a valid reason at the time of termination* and not on whether or not the terminating party (subjectively) knew or believed there to be one. (Emphasis added.)

[131] At the point of oral termination on 5 December 2014 the plaintiff had completed 88.41% of the plaintiff's works under the final revised contract sum with a minimal 11% balance works remaining, to be completed by 22 December 2014, assuming that to be the completion date set by D2. This is inspite of delay caused by the defendants.

[132] DW2 also confirmed under cross-examination that from the certificate of payment No 3 which is on the 27 October 2014 up till the 5 December 2014 (date of termination), a period of 38 days, there were M&E works valued at RM202,400 plus RM63,075 for pure building works. The overall works done (not including the VOs) would be RM265,475.

[133] He further agreed that when RM265,475 of works over 38 days had been done, that was reasonable progress of the works and that D1 should have consulted him before terminating the contract based on what DW1 said in court was the slow progress in the works between the last meeting and the date of inspection of the works on 5 December 2014.

[134] There is no good reason to terminate the contract under common law in a case where the plaintiff was still diligently carrying on the works in spite of delay occasioned by the defendants. There was no schedule of progress of works tendered in evidence to show that the plaintiff had fallen back alarmingly in their rate of progress in the works.

[135] The oral on-the-spot termination by D1 is unlawful in the circumstances of the case. That being the case, D2 is not entitled to claim for loss of net profits arising from the so-called delay in the commencement of business in the 'Royce Hotel'.

Whether D2 had proved a loss of net profit of RM1,079,510.88 suffered by D2 as a result of the delay by the plaintiff causing the delay to the operations of the 'Royce Hotel

[136] At any rate D2's claim for loss of net profits had not been proved on a balance of probabilities.

[137] The plaintiff through their solicitors had served a notice to produce documents pertaining to the completion and operation of Royce Hotel, particularly items 6 and 7 of the notice to produce in Annexure A, particularly the certificates from the architect and consultants pertaining to the fitness and safety of the building to be occupied, whether and when the Certificate of Fitness for Occupation ('CFO') or Certificate of Completion and Compliance ('CCC') were issued to show the date from which the Royce Hotel site was ready for occupation and operation.

[138] The defendants had been resolute in refusing to produce these documents which would substantiate when the hotel was ready for business.

[139] The defendants also failed to produce any documents in the form of application forms, certificates or licenses as requested in item 7 of the notice to produce to prove the operation of Royce Hotel.

[140] The defendants had not shown the period of delay attributed to the plaintiff as there was no certificate of non-completion issued to the plaintiff by the architect DW2 and understandably so as DW2 had taken the position that the defendants were the cause of the delay and not the plaintiff.

[141] Any claim for loss of profit arising from a so-called delay in completion on the part of the plaintiff must involve the defendants opening up their books to show when the new contractors had finished the balance works and when the

CPC and CCC were issued and the various licenses in operating a hotel were obtained for otherwise the plaintiff would be made liable for that for which they were not responsible.

[142] D2's claim for loss of profits in the delay in the operation of the hotel is both dubious and spurious, shrouded as it is in secrecy. The non-production of the necessary documents to substantiate D2's claim would call for the operation of s 114(g) of the Evidence Act 1950 in that an adverse inference shall be drawn against D2.

[143] There is yet another unhappy feature of the way D2 sought to lump the loss to the plaintiff. D2 had produced what was referred to as the 'Manager's Report (Revenue) — Inclusive all tax & Commission' at DBOD3, pp 121–132 and what it claimed to be an income statement in DBOD1, p 213. In other words, these documents relied upon by D2 are nothing more than statements of accounts.

[144] The plaintiff's solicitors had in item 8 of their notice to produce in Annexure A, p 135 had requested the defendants to produce 'all account books, statement of accounts and documents related to the occupancy rate, profits or losses of the Royce Hotel business' but to no avail.

[145] However statements of accounts by themselves are not sufficient to establish the defendants' claims for damages. The Court of Appeal in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 provided the following guidance with respect to proving damages arising out of loss of profit as follows:

> [52] It is clear that the *statements of account* marked as ... are *by themselves not sufficient to establish the respondent's claim for damages*.
>
> [53] They only show profit for 1996 and 1997. *They do not show how the alleged loss had come about.*
>
> [54] Even in Ramlan's testimony as evident ... although details were given ... the *respondent failed to prove the contents and show how their contents were related to the breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered* therefrom flowing from the breach.
>
> [55] The respondent's *failure to produce or tender account books or the necessary support documents upon which the audited statements of account were based is fatal to his claim for damages*. Thus, we find that the *audited statements of account and Ramlan's oral evidence* in connection therewith are *inadmissible*.
>
> [56] The case of *Johnson v Kershaw* 63 ER 1059... illustrates the above position ... :
>
> > If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill

might be receivable; but, *in as much as the books were not in evidence, I must decline to receive the deposition of Mr Seet as to their contents*.

[57] Though it was put across by the respondent that Ramlan as director of the respondent was also the maker of the audited statements of account and that therefore the said audited statements were properly tendered and accepted at the trial, *nothing was further from the truth*.

[58] We found *nothing in the notes of evidence to show that Ramlan is the maker* of the audited statements of account in that he had *personal knowledge of the contents or that he had signed* the said audited statements.

[59] Even if Ramlan had in fact been the maker of the audited statements of account, it is *still incumbent upon him to produce the books of account upon which the audited statements were based* (see *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627) and *Popular Industries Ltd v Eastern Garment* [1989] 3 MLJ 360).

[60] It was submitted by the appellant's counsel that the said audited statements of account are *inadmissible by virtue of the respondent's failure to comply with* s 64 of the Evidence Act 1950 *requiring that when documentary evidence is tendered, primary evidence of the document ie the production of the documents itself is essential*. (Emphasis added.)

[146] The manager's report (revenue) documents are nothing more than a statement of income and revenues generated by Royce Hotel. They do not show the expenses and costs of D2 nor the manner in which the gross profit is calculated. In other words the base and primary documents had not been produced. D2 must be prepared to open their books and show their costs of running the hotel and more so here when it is generally accepted in hotel business that some lead time would be necessary to do the marketing and promotion. DW1 under cross-examination admitted reluctantly that D2 had not produced any documents in the bundle of documents evidencing D2's operation costs of the hotel. Learned counsel for the defendants confirmed this.

[147] As often being said, the difficulty in proving loss of profits does not dispense with proof of it. D2 failed to produce or tender account books and the necessary support documents upon which their statements of account were based. I agree with the plaintiff that this is fatal to D2's claim for damages.

[148] The claim for damages in the loss of net profit arising out of the so-called delay caused by the plaintiff in completing the works leading to the late opening of the hotel has to be dismissed for lack of evidence.

Whether D1 had proved the loan of RM800,000 to the plaintiff which is to be returned to D1

[149] There is no evidence to show that this was a loan by D1 to the plaintiff for if indeed it was, one would have expected the terms of the loan to have been spelt out.

[150] In the context of this contract it is more likely that this is advance payment to the plaintiff for them to start the works; it is not uncommon for a relatively small contractor who cannot be expected to fund the project to actually ask and receive an advance for purchase of materials and supply of labour.

[151] This sum of RM800,000 had been fully accounted for in the payments made towards the claim for works done by the plaintiff. The plaintiff had acknowledged that RM800,000 had been utilised towards payment of the amount certified by the architect DW2 as being outstanding and that there was a further sum of RM124,975 paid by D1 to the plaintiff for the works.

[152] I am more than satisfied that the total sum of RM924,975 paid by D1 to the plaintiff had been accounted for and treated as payment for the works done by the plaintiff for the project and that includes the RM800,000 advanced to the plaintiff.

[153] D1 had refused to accept DW2's explanation of certificate of payment No 3 in DBOD1, p 3 and had insisted that the value of the plaintiff's works was only RM124,975 without taking into consideration the earlier payments of RM800,000 made to the plaintiff from the advance.

[154] Though the sum of RM800,000 was advanced by D1 to the plaintiff, it was meant to be for the project and the plaintiff had understood it as such. There is thus no further sum of RM800,000 still outstanding as a loan from D1 to the plaintiff.

Whether D2 had proved damages in the sum of RM277,492.50 for the defective, and non-compliant works of the plaintiff

[155] Throughout the contract and the project neither the M&E Consultant PW3 nor the architect DW2 at the material time, had issued any engineer's instruction or architect's instruction, as the case maybe, to the plaintiff to rectify any works. There was also no non-compliance reports ('NCR'), list of defects, site instructions, letters or minutes of meeting on defective works.

[156] DW1 had produced a considerable amount of documents in DBOD1 and DBOD3 comprised of alleged quotations, invoices, payment vouchers and 'proofs of payment' for the completion of balance works left and the alleged defects rectification costs following the plaintiff's termination.

[157] However none of these balance/defect rectification works had been valued, assessed or certified by either PW3 the M&E consultant or DW2 the fourth architect for the project. Instead, evidence was given at the trial by DW1 and DW3 respectively that payment by the defendants to the third party subcontractors was done after visual inspection and approval by DW3 (see notes of evidence Vol 1, Day 8, pp 277–280). DW3 Dhevakumar a/l Miniandy, was the site supervisor of the project engaged by the defendants.

[158] One would have expected that after the termination of the plaintiff the defendants would have been more appreciative of the need to engage a QS for the project but this was not to be. The defendants would pay as and when they feel like it for an amount they choose.

[159] There was no clear distinction between which works were balance works and which were defective works. Balance works within the scope of the plaintiff's work are not payable as this court had held that the termination was unlawful.

[160] As for the alleged defective works done by the plaintiff it must be clearly shown that these are defective works within the scope of the plaintiff's work and not additional work ordered by the defendants after the termination of the plaintiff.

[161] It is to be noted that the defendants are now claiming against the plaintiff for the value of works originally in the plaintiff's scope of works that had been omitted such as cement rendering, tiling works, water heater, lift, air conditioning, carpet and plaster ceiling works. The evidence with respect to the above are found in the notes of evidence as follows:

(a) cement rendering (see notes of evidence Vol 2, Day 17, pp 689–690 and CBOD3, p 519, item 27);

(b) tiling works (see notes of evidence Vol 2, Day 17, pp 690 & 690 and CBOD3, p 519);

(c) water heater, lift, air conditioning, carpet (see CBOD3, pp 396–398); and

(d) plaster ceilings (see notes of evidence Vol 2, Day 19, pp 739–741, 758–760).

[162] There were also claims for renovation works and finishes, which were not in the plaintiff's scope of works, to which DW4, the QS engaged by the defendants after the commencement of the trial, admitted she did not know what they comprised of (see notes of evidence Vol 2, Day 17, p 691).

[163] The defendants had also sought to claim for additional and external works not originally in the plaintiff's scope of works or even completely unrelated to the plaintiff such as: A

(a) changing the name of the property with TNB (see DBOD3, p 15);

(b) application for meter with TNB (see DBOD3, p 16); B

(c) electricity bill (see DBOD3, pp 17 and 24–28);

(d) external cable works from sub station to the project, which PW3 has confirmed as outside the plaintiff's scope (see DBOD3, pp 19–20); C

(e) TNB contribution fees and deposit, which at the end of the day belongs to the defendants and can be recouped by the defendants (see DBOD3, pp 21–24, 29 and 31); and

(f) upgrading the power of Royce Hotel to 200/5A (see DBOD3, p 31). D

[164] DW3 oversaw the completion of the balance works as well as the alleged rectification of the plaintiff's works following the termination of the contract. As admitted under cross-examination, he was more a hotelier from his employment history and not a professionally trained site supervisor; his diploma was in hotel management and not contracts management. DW3 has no experience in assessing or valuing mechanical and electrical works done or building works done. E

[165] The defendants had called DW3 as a witness in this trial to testify on the alleged defects in the plaintiff's works, particularly in respect of plumbing/sanitary works (see DBOD4, pp 44–51), M&E electrical works (see DBOD4, pp 52–62), non-competent workers (see DBOD4, pp 63–65), and building structural and wet works (see DBOD4, pp 66–76). The works done including the so-called defects were not valued or assessed by either the M&E consultant or the architect. DW3 had approved the claims submitted by the subcontractors by way of visual inspection. F G

[166] Little weight can be attached to it in the light of the unsatisfactory evidence alluded to above and in the absence of the M&E consultant and the architect's corroboration of the defective works. Though DW1 had insisted that no payments can be made to the plaintiff for the works done other than after a QS had certified the value of the works, yet payments were made to third party contractors after the termination of the plaintiff's contract without such valuation and certification. H I

[167] DW4, Datin Sr Sofiah bt Mohd Salim confirmed that she could not verify any defective works caused by the plaintiff. None of the contractors who did the rectification works had come forward to give evidence. DW4 herself

admitted that she did not go to the project site at all and understandably so because by the time she was appointed to prepare her report of the works done, the substitute contractors had already completed the works.

[168] The overall evidence to support and substantiate the defendants' claim for defective works are unsatisfactory. Even accepting for a moment that a credit card transaction receipt for RM30,000 paid to a completely unrelated party, Back to School Restaurant & Bar at DBOD3, p 53 is an indirect payment made to a third party contractor, that does not help the defendants to prove that the works are defective works within the scope of the plaintiff's sorks to begin with.

[169] I am further satisfied that though there might have been some shoddy works as stated by DW2, there was no opportunity for the plaintiff to make good as the oral termination was on-the-spot without any prior notice to rectify any breach. DW2 had also given evidence that his assessment and valuation of the works done were confined only to the works properly done and not to works that were shoddy where the plaintiff had no opportunity to make good yet. His stand is that the plaintiff's work could not be said to be defective as at the point of termination, the plaintiff had not completed the works yet and any works not according to the specifications or substandard works had not been assessed or verified for payment.

[170] I have no good reason to disbelieve the architect DW2 who gave his evidence candidly as a professional.

PRONOUNCEMENT

[171] The various heads of claims allowed by this court consisting of building works, M&E works and the materials and equipment left at site are tabulated below together with the payments received by the plaintiff as follows:

ITEM	EVIDENCE	AMOUNT
Building Works	CBD4, p 692	871,165.00
M&E works:		
Electrical works	CBOD4, p 632	221,200.00
sanitary piping	CBOD4, p 637	78,300.00
cold water piping	CBOD4, p 638	105,168.00
		404,668.00
Total value of works (not-inclusive VOs and materials)		1,275,833.00

ITEM	EVIDENCE	AMOUNT
Total amount paid by defendants deduct payments on behalf Amount paid to plaintiff	DBOD3, p 4 & 5	924,975.00 – 39,500.00 885,475.00
Difference between amount paid (RM885,475.00) and building works (RM871,165.00), ie overpaid		14,310.00
Balance for plaintiff's works only		390,358.00
VO1 VO3 VO4		37,950.00 22,850.00 16,000.00
		76,800.00
Materials & equipment left behind		30,000
TOTAL QUANTUM ALLOWED OF PLAINTIFF'S CLAIM		497,158.00

[172] The above sum of RM497,158 shall carry interest at the rate of 5%pa from the date of statement of claim to realisation.

[173] For the reasons given above, D1 and D2's' counterclaim was dismissed. D3's defence on ground of lack of privity of contract was also dismissed.

[174] As for costs I had allowed the plaintiff a single costs of RM60,000 and allocator to be paid before extracting order of costs. Interest in the costs shall be at 5%pa from date of statement of claim to realisation.

Order accordingly.

Reported by Kamarul Anwar